

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HAROLD STANLEY ROBINSON

Claimant

VS.

SW BELL TELEPHONE CO.

Self-Insured Respondent

Docket No. **1,015,669**

ORDER

Claimant requested review of the April 10, 2009 Order by Administrative Law Judge Nelsonna Potts Barnes. Both parties submitted briefs and the case was placed on the Board's summary docket, for decision without oral argument.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for the claimant. David F. Menghini of Kansas City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is an appeal from the Administrative Law Judge's (ALJ) Order denying claimant's request for penalties against the respondent for failure to timely pay the compensation awarded by the Court of Appeals. The ALJ found that claimant's K.S.A. 44-512a demand letter was served on respondent before the Court of Appeals' decision was final because the Supreme Court had not ruled on claimant's petition for review. Consequently, the ALJ ruled that the demand was premature as there were no compensation payments past due and unpaid.

The sole issue raised by the claimant is whether the ALJ erred in denying penalties pursuant to K.S.A. 44-512a. Claimant argues that the Workers Compensation Act is complete in and of itself and does not contain any provision staying payment of the

decision of the Court of Appeals during the pendency of a petition for review with the Supreme Court.

In contrast, respondent argues Supreme Court Rule 8.03(f) provides that if a petition for review by the Supreme Court is filed, then the decision of the Court of Appeals does not become final until the date of the decision denying the review. Respondent further argues claimant's demand for payment was premature as it was made months before the Supreme Court denied the request for review. Stated another way there was no payment due and unpaid until after the Supreme Court denied the request for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The facts are essentially undisputed. The ALJ's Award in this claim was entered on April 24, 2006. Upon review, the Board, in an Order dated September 29, 2006, modified the ALJ's Award. Claimant then appealed the Board's Order to the Court of Appeals. The Court of Appeals affirmed the Board's Order in a decision dated April 4, 2008. The claimant then filed a petition for review of the Court of Appeals' decision with the Supreme Court. On June 26, 2008 claimant made a K.S.A. 44-512a demand on respondent for payment of the compensation awarded by the Court of Appeals. On September 22, 2008, the Supreme Court denied claimant's petition for review. Respondent, by a check dated October 10, 2008, paid all the compensation due claimant as a result of the Court of Appeals' decision.

At the motion hearing for penalties held on January 22, 2009, claimant was requesting penalties for 27 weeks at \$100 a week which represents the time period between the Court of Appeals decision and respondent's final payment of the award on October 10, 2008. As previously noted, the claimant argued that the Workers Compensation Act is complete in and of itself and does not contain any provisions that stay payment of the compensation awarded by the Court of Appeals if a petition for review of that decision is filed with the Supreme Court. Respondent argued that there was no final decision by the Court of Appeals until the petition for review by the Supreme Court was denied.

The ALJ determined that the Court of Appeals decision did not become final until claimant's petition for review was denied by the Supreme Court on September 22, 2008. The ALJ concluded the demand letter was premature and when served on respondent there were no compensation payments due or unpaid. Consequently, claimant's request for penalties was denied.

Claimant requests review and argues:

Claimant contends that the Workers Compensation Act is complete in and of itself in that the Administrative Law Judge erroneously grafted into the Workers Compensation Act a Supreme Court rule that basically states that the mandate of the Court of Appeals when a decision is made does not become final until a petition for review is either heard and decided by the Supreme Court or the Supreme Court refuses to accept a petition for review. However, no where within the Workers Compensation Act is there any provision for the staying of the payment of an Award during the pendency of a petition for review with the Supreme Court. Furthermore, the Workers Compensation Act clearly states that Awards are stayed in part when they are appealed from the Administrative Law Judge to the Kansas Workers Compensation Appeals Board and when they are appealed from the Kansas Workers Compensation Board to the Kansas Court of Appeals. However, that is where the Kansas Workers Compensation Act stops granting stays of the payment of awards pending decisions of any courts. Since the Workers Compensation Act does not provide for the staying of execution, levy or the pursuit of moneys awarded to the claimant in an award after that award has been affirmed or modified by the Kansas Court of Appeals and before the Supreme Court makes a decision on a petition for review, the respondents failure to pay the Award in a timely fashion warrants penalties at one hundred dollars a week or a remand of this matter back to the Administrative Law Judge to make such assessment.¹

In contrast, respondent argues that Supreme Court Rule 8.03(f) specifically provides if a petition for review of a Court of Appeals decision is filed with the Supreme Court, then the Court of Appeals decision does not become final until the date of the Supreme Court's decision denying the request. Consequently, under the facts of this case there was no compensation payment due or unpaid as required to support a demand for and assessment of penalties.

K.S.A. 44-512a allows civil penalties when compensation, which is unpaid and past due, is not paid in a timely fashion. The statute requires that a written demand for payment setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due must be either personally or by registered mail delivered to the employer or the insurance carrier and its attorney of record. Respondent then has 20 days from the date of service of such demand to make payment or be assessed penalties. The statute allows for penalties of up to \$100 per week for each week any disability compensation is past due.

¹ Claimant's Brief at 1-2 (filed May 20, 2009).

The Board must first consider whether the limitations of K.S.A. 2008 Supp. 44-556(b) apply to review by only the Court of Appeals or whether they further apply to appeals before the Kansas Supreme Court.

K.S.A. 2008 Supp. 44-556 provides:

(a) Any action of the board pursuant to the workers compensation act, other than the disposition of appeals of preliminary orders or awards under K.S.A. 44-534a and amendments thereto, shall be subject to review in accordance with the act for judicial review and civil enforcement of agency actions by appeal directly to the court of appeals. Any party may appeal from a final order of the board by filing an appeal with the court of appeals within 30 days of the date of the final order. When an appeal has been filed pursuant to this section, an appellee may file a cross appeal within 20 days after the date upon which the appellee was served with notice of the appeal. Such review shall be upon questions of law.

(b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

Claimant argues that K.S.A. 2008 Supp. 44-556(b) applies only to decisions of the Court of Appeals on review. Claimant further argues that after the Court of Appeals decision was rendered on April 4, 2008, the stay limitations of that statute no longer applied and payments by respondent would be immediately due.

However, in addition to K.S.A. 2008 Supp. 44-556, the Board must also consider Kansas Supreme Court Rule 8.03(i) which states in part:

The timely filing of a petition for review shall stay the issuance of the mandate of the Court of Appeals. Pending the determination of the Supreme Court on the petition for review or during the time in which to file a petition for review, the opinion of the Court of Appeals is not binding on the parties, or on the district courts. . . . If review is refused, the decision of the Court of Appeals shall be final as of the date of the refusal, and the mandate of the Court of Appeals shall be issued by the Clerk forthwith.

The Board finds by virtue of Kansas Supreme Court Rule 8.03(i) that the limitations set forth in K.S.A. 2008 Supp. 44-556 include appeals to the Kansas Supreme Court, as the opinion of the Court of Appeals is not final pending the decision of the Kansas Supreme Court. Therefore, the Court of Appeals decision issued April 4, 2008, did not become final until respondent's petition for review to the Supreme Court was denied on September 22, 2008.

In *Hallmark*² it was noted “[a] statutory demand under 44-512a can only be effective for compensation awarded the claimant then due and unpaid.”³ *Hallmark* goes on to note that when payment of compensation is not delinquent, then there can be no valid statutory demand upon which to predicate a 44-512a action.⁴

The Board must next consider whether the penalty provisions of K.S.A. 44-512a would be appropriate pending a Kansas Supreme Court decision on a petition for review. K.S.A. 2008 Supp. 44-556(b) requires payment of compensation for the 10 weeks preceding the Board’s decision, and weekly thereafter, pending the decision of the Court of Appeals. Stated another way, K.S.A. 44-556(b) requires that weekly disability benefit payments actually due and payable during the 10-week time period immediately before the Board’s decision are payable if the Board’s decision is then appealed to the Court of Appeals and the employer must begin paying the weekly disability compensation that accrues and would actually be payable after the effective date of the Board’s decision, plus the weekly disability compensation actually due during the weeks before the decision of the Court of Appeals.

Respondent’s failure to pay benefits under K.S.A. 2008 Supp. 44-556(b) during the 10 weeks preceding the board’s decision, and weekly thereafter, pending the decision of the Court of Appeals, would normally entitle claimant to penalties under K.S.A. 44-512a. However, here, the Board must consider an additional issue. Claimant’s date of accident was determined to be July 17, 1999. The Board’s Order awarded 52.29 weeks of temporary total disability compensation, followed by 251.18 weeks of permanent partial disability compensation. With a date of accident in July 1999, all the weeks of compensation benefits would have come due well before the 10-week period preceding the Board’s decision. At the penalties hearing claimant’s attorney agreed all of the compensation benefits were due before the Board’s decision. Claimant’s attorney noted in pertinent part:

Basically, it [K.S.A. 44-556(b)] says that any benefits that are due 10 weeks immediately preceding the appeal -- and I’m probably paraphrasing it, but I don’t think that this is necessarily the most important issue or an important issue in this particular case because all of the benefits were past due benefits that were not

² *Hallmark v. Dalton Construction Co.*, 206 Kan. 159, 476 P.2d 221 (1970).

³ *Id.* at 161.

⁴ *Id.* at 161.

subject to be paid pending the decision by the Court of Appeals, but if that had been the case, then some of the benefits could have been payable.⁵

The Board, on numerous occasions, has held that, when all weeks of disability compensation have accrued before the 10-week period before the Board's decision, then no weekly compensation would be due and payable during that period. Therefore, penalties under K.S.A. 44-512a would not be appropriate.

Before the 1993 amendments, K.S.A. 44-556(c) read in pertinent part, "[i]f review of the decision of the district court is sought . . . the compensation payable under the decision of the district court shall not be stayed pending such review." However, in 1993 K.S.A. 44-556 was amended. As previously noted K.S.A. 2008 Supp. 44-556(b) now provides, that commencement of an action for review by the court of appeals shall not stay the payment of *compensation due* for the ten-week period preceding the board's decision and for the period of time after the board's decision before the decision of the court of appeals. Again, as previously noted, claimant does not contend that all of the compensation benefits were due and payable and instead agrees that all the compensation benefits awarded were due well before the ten weeks preceding the Board's decision.

Should K.S.A. 2008 Supp. 44-556(b) be read to require a lump-sum payment of compensation rather than payment of compensation due for only the ten-week period preceding the Appeals Board's April 13, 1999, decision and during the pendency of the appeal to the Court of Appeals? Granted, the intent of K.S.A. 2008 Supp. 44-556(b) is for claimant to receive weekly benefits during the pendency of an appeal, but to require payment of a lump sum award goes beyond this intent. The instant factual situation is created in part by the accelerated payout formula under K.S.A. 44-510e that took effect July 1, 1993. Before then, permanent partial disability benefits were paid out over 415 weeks and, therefore, weekly disability benefits were much more likely to still be ongoing at the time of an appeal to the Court of Appeals. But to interpret K.S.A. 2008 Supp. 44-556(b) to require payment of weekly compensation that became due before "the ten-week period next preceding the board's decision" goes beyond the clear language of the statute. The specific limitation that payment during an appeal include only the ten-week period before the Board's decision clearly demonstrated the legislative intent that a lump sum payment was not intended.

Consequently, there were no payments due and unpaid when the claimant made his K.S.A. 44-512a demand because the Court of Appeals decision did not become final until the Supreme Court denied the petition for review on September 22, 2008. And there were no payments due for the 10-week period preceding the Board's Order. Accordingly,

⁵ M.H. Trans. at 8.

the K.S.A. 44-512a demand letter served by claimant was premature. The Board affirms the ALJ's Order denying claimant's request for penalties.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 10, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
David F. Menghini, Attorney for the Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge